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AMSTER L. STEVENS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EMMA LEE PAUL,

Petitioner,

—vs—

**ALEX HALEY, DOUBLEDAY & COMPANY, INC.,
DOUBLEDAY PUBLISHING CO., INC., AMERICAN
BROADCASTING COMPANIES, INC., and DELL
PUBLISHING CO., INC.,**

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF OF RESPONDENT AMERICAN BROADCASTING
COMPANIES, INC. OPPOSING CERTIORARI**

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On the Brief

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Supreme Court Rule 28.1

Pursuant to Supreme Court Rule 28.1, the Court is hereby advised that the non-wholly owned subsidiaries and/or affiliates of American Broadcasting Companies, Inc. are: Newton Falls Paper Mill Co., Inc.; Sutro Tower, Inc.; Producciones Tecnicas; UPITN Corporation; Hearst/ABC Video Services; Hearst/ABC-Viacom Entertainment Services; and Hearst/ABC-RCTV.

IN THE
Supreme Court of the United States

October Term, 1983

No. 83-1304

EMMA LEE PAUL,

Petitioner,

—VS—

ALEX HALEY, DOUBLEDAY & COMPANY, INC., DOUBLEDAY
PUBLISHING CO., INC., AMERICAN BROADCASTING COM-
PANIES, INC., and DELL PUBLISHING CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF RESPONDENT AMERICAN BROADCASTING
COMPANIES, INC. OPPOSING CERTIORARI**

Respondent American Broadcasting Companies, Inc. ("ABC") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the memorandum decision of the Second Circuit Court of Appeals in this case. ABC herein addresses only the second of the two reasons asserted by petitioner for granting the writ,*

* The first asserted reason addresses a cause of action for state law unfair competition in which ABC was not named (Petition at 6; A-25). This reason for granting the writ appears unfounded as it seeks an advisory opinion and the issue was not raised or preserved by petitioner in the District Court or Court of Appeals. In any event, *see also* § 205(a) of the New York Civil Practice Law and Rules, New York's tolling provision.

concerning petitioner's federal copyright claim that ABC's televised versions of *Roots* (and co-respondents' written work *Roots*) infringed her alleged copyright in an unpublished autobiographical manuscript called *The Bold Truth*. This claim has been rejected by the Federal Magistrate, the District Court and the Court of Appeals.

Question Presented

Should this Court use this spurious copyright infringement action to institute a new rule precluding federal courts from awarding summary judgment in any copyright infringement action in which the plaintiff claims similarities between its work and an allegedly infringing work?

Reasons for Denying the Writ

I.

Three Tiers of the Federal Judiciary Reviewed Petitioner's and Respondent's Works and Correctly Ruled That There Exist No Substantial Similarities as a Matter of Law.

This petition raises no important question of federal copyright law. The works were examined by the courts below and were found to have no actionable similarities. Petitioner shied away from presenting side by side comparison of passages from her work and from the allegedly infringing ABC teleplays. Respondents, however, prepared such analyses for the courts below, and each ruled that there was a complete lack of actionable similarities between the works. The magistrate reported:

Each of the alleged similarities has been compared. Some are so strained as to defy the imagination. None approach infringement.

(A-7). The District Court conducted a *de novo* review and held:

whether viewed separately or together, the claimed "coincidences" are insufficient to raise a triable issue of fact as to the substantial similarities that would be necessary to support plaintiff's claim of copyright infringement against the defendants. . . ."

(A-19). The Court of Appeals confirmed:

we do not find that the district court erred as a matter of law in granting summary judgment in favor of defendants since our own review shows an absence of similarities between appellant's book and the challenged work.

(A-30). Thus, contrary to petitioner's faulty premise in stating the Question Presented (A-30, A-34), the courts below considered the question of similarity and uniformly ruled that the two works are not similar.

II.

The Decisions Below Follow Established Law Authorizing Summary Judgment Where There Exist No Substantial Similarities as a Matter of Law.

Established law authorizes courts to award summary judgment either because no reasonable jury could find the two works substantially similar, or upon a determination that the alleged similarities between two works concern only noncopyrightable historical facts and ideas. *See, e.g., Warner Bros., Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d 231 (2d Cir. 1983); *See v. Durang*, 711 F.2d 141 (9th Cir. 1983); *Burroughs v. Metro-Goldwyn-Mayer*, 683 F.2d 610, 623 (2d Cir. 1982); *Hoehling v.*

Universal City Studios, Inc., 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) ("These cases signal an important development in the law of copyright, permitting courts to put a 'swift end to meritless litigation' and to avoid lengthy and costly trials.");* *Davis v. United Artists, Inc.*, 547 F. Supp. 722 (S.D.N.Y. 1982) ("The similarities claimed by plaintiff are either strained or devoid of legal significance").

Summary judgment was appropriate in this case because as the Court of Appeals found there was an absence of similarities between the works in question. Moreover, to the extent petitioner pointed to the works' few common subjects, she misconceived the nature of copyright protection. The protection granted to a copyrighted work extends only to the particular expression of an idea and not to the idea itself. *Mazer v. Stein*, 347 U.S. 201, 217-218 (1954); *Reyher v. Children's Television Workshop*, 533 F.2d 87 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976). Petitioner cannot claim infringement by ABC's use of history, culture and ideas, as reflected in the example of supposed infringement which petitioner cites to this Court. (Petition at 34).** *Hoehling v. Universal City Studios, Inc.*, *supra*; (A-29).

The courts below correctly granted summary judgment on these grounds and authorities' (A-28-30).

* Even the early case of *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947), relied upon by petitioner, acknowledged cases "in which absence of similarities is so patent that a summary judgment for defendant would be correct."

** Petitioner admits and the courts below found that *The Bold Truth* is an autobiographical nonfiction work based upon the lives of blacks in the South, including the life of the petitioner. (A-1, A-7, A-24).

Conclusion

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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